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In The

Supreme Court of the United States

October Term, 1940.

New York Handkerchief Manufacturing Company,

Petitioner,

v.

National Labor Relations Board,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

John L. McInerney,
1 N. LaSalle St.,
Chicago, Illinois,
Attorney for Petitioner.

Of Counsel:
Charles L. Cohen.

Midwest Law Printing Co.
Delaware 6669
361 W. Superior St.
Chicago

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New York Handkerchief Manufacturing Company, petitioner, prays that a Writ of *Certiorari* issue to review the decree of the United States Circuit Court of Appeals, for the Seventh Circuit, entered on July 11, 1940, enforcing an order of the National Labor Relations Board.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (Tr. 45) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Board are reported in.....

JURISDICTION.

The decree of the Circuit Court of Appeals was entered on October 2, 1940 (Tr. 57). The jurisdiction of this Court is invoked under Sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, Secs. 346 and 347).

DATE OF ORDER TO BE REVIEWED.

The opinion of the Circuit Court of Appeals affirming the order of the National Labor Relations Board was entered on July 11, 1940. This petition for Writ of *Certiorari* and supporting transcript of record are filed in this Court within three months from July 11, 1940, on October ...., 1940.

QUESTIONS PRESENTED.

1. Can the Board utilize an election participated in by less than a majority of the employees of the appropriate unit as the basis for certification that the Union represents a majority of the employees of such unit, and can the Board justify itself in the exercise of authority to certify a Union as the bargaining agent, where less than a majority of the appropriate unit voted, on the theory that the company was guilty of coercion and intimidation?

2. Can the Board make retroactive its order by directing the company to pay back-pay to its employees who were laid off or discharged prior to the date when the Union was certified as the exclusive bargaining agent?

STATUTES INVOLVED.

The pertinent provisions of the National Labor Relations Act, which petitioner respectfully asks this Court to pass upon is Section 9 (a), and reads as follows:

> "National Labor Relations Act. Representatives and Elections:
>
> Sec. 9 (a) Representations designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

STATEMENT OF FACTS.

Petitioner is an Illinois corporation engaged in the manufacture, at Chicago, Illinois, of low grade handkerchiefs and employs up to 300 persons during the busy time of the year.

On November 16, 1937, the company received a letter from A. Plotkin, a general organizer for the International Ladies Garment Workers Union, in which he stated that a majority of the employees of the Petitioner have affiliated themselves with the International Ladies Garment Workers Union. On November 23rd, the Petitioner in answer to this letter, wrote the Union to the effect that they felt that the statement made in the letter of the Union was in error and no negotiations were necessary.

The National Labor Relations Board conducted an investigation and on Friday, January 28, 1938, a hearing was held before John A. Lapp, Trial Examiner, who recommended that an election be held. On February 26,

1938, the Board ordered an election be held of all of the employees of the company excepting clerical and supervisory employees and those who have since quit or had been discharged for cause. This election was held on March 24, 1938, and on the 8th day of April, 1938, the regional director of the Board for the 13th region issued an Intermediate Report on Secret Ballot in which he made the following findings:

Total Number Eligible (approximately)	225
Total Ballots Cast	56
Necessary to Elect	29
Ballots Cast for International Ladies Garment Workers Union Local 76	53
Ballots Cast Against International Ladies Garment Workers Union Local	3
Challenged Ballots Cast	0
Blank Ballots Cast	0
Ballots Spoiled or Void	0

In this Intermediate Report, charges of spying and surveillance, interference and coercion were made and the Regional Director in his report states, that in view of the obvious surveillance and interference by representatives of the company, the International Ladies Garment Workers Local 76 should be certified as the exclusive representative of the employees of the company in the unit declared appropriate by the Board, *even though a comparatively small percentage of the employees voted at such election.* (Italics supplied.) Any exceptions to this intermediate report should be filed within five days. Exceptions of the Company to this report were filed, but no hearing was held by the Board.

On June 1, 1938, the Board certified the International Ladies Garment Workers Union as bargaining agent for the employees of the Company and on June 24, 1938, the charges from which this appeal follows were filed against the Company. The decision of the Board to declare the

International Ladies Garment Workers Union as the exclusive bargaining agent of the employees of the Company, even though a comparatively few voted, as stated in the Intermediate Report, was made by the Board *ex parte.*

It was agreed between the Board and Petitioner that the appropriate unit for collective bargaining was all employees of Petitioner excepting clerical and supervisory employees. Thereafter, on June 24, 1938, the Board issued a complaint against your Petitioner alleging that the Petitioner had refused to bargain collectively with the Union; that petitioner had discharged certain named employees; that 25 employees were named as having been discriminated against. A hearing was held before a Trial Examiner from June 30 to July 8, 1938; the Trial Examiner rendered his report, and on October 26, 1939, the Board rendered its decision setting forth its findings of fact, conclusions of law and order. The Board found that Petitioner had committed the unfair practices as charged, but had not discriminated against all of the employees named in the complaint. Petitioner was found not to have discriminated against 14 employees and was dismissed as to them. Petitioner was ordered to cease and desist from its unfair labor practices; was directed to bargain collectively upon request with the Union; to offer reinstatement with back pay to seven named employees, and to make whole four other employees.

SUGGESTIONS FOR GRANTING THE WRIT.

1. **Can the Board utilize an election participated in by less than a majority of the employees of the appropriate unit as the basis for certification that the Union represents a majority of the employees of such unit, and can the Board justify itself in the exercise of authority to certify a Union as the bargaining agent, where less than a majority of the appropriate unit voted, on the theory that the company was guilty of coercion and intimidation?**

The opinion of the Circuit Court of Appeals with reference to this point states:

> "The total number of employees eligible to vote was about 225, of whom 56 voted. Fifty-three of those voting were favorable to the Union, and three opposed. *The authority of the Board to certify the Union under such circumstances presents an important question, not free from doubt.* (Italics supplied.) In this connection it must be kept in mind, that we have sustained the Board's finding to the effect that petitioner was guilty of coercion and intimidation against its employees, which, no doubt, prevented many of them from participating in the election. There is no question raised but that the Board found the appropriate unit."

The Court in its opinion further says:

> "The Board argues that its construction accords with the plain language of the Act and also with the decision in *Virginian Ry.* v. *Federation*, 300 U. S. 515, construing a similar provision of the Railway Labor Act. We are not as confident concerning the plain language of the Act as is the Board, but we agree that the decision of the Supreme Court in the case just cited furnishes strong support to the Board's contention."

The Circuit Court of Appeals is uncertain what construction shall be placed on Section 9 (a), and bases its opinion, not on the construction of the statute itself, but upon the fact that Petitioner was guilty of coercion and intimidation of its employees, for in its opinion it further says (Tr. 45-H).

> "It does not follow, however, that the Board could justify itself in the exercise of such authority in every case regardless of the number who participated in the election. Like any other authority, it must not be employed arbitrarily. In the instant case, as found by the Board, petitioner, by its unlawful conduct, interfered with the right of its employees to participate in the election, and no doubt, was responsible for the small proportion of its employees voting. Under such circumstances, we are of the opinion that the Board not only was within its authority, but was justified in concluding that the Union was the proper representative."

The construction placed on that part of Section 9 (a) that representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, by the Board, and upheld by the Circuit Court of Appeals, goes beyond the simple language of the Act, and puts the Board in position to designate any Union that it sees fit as the bargaining agent, provided that it did not act arbitrarily. That whenever the vote cast at any election is less than a majority in that particular unit, the Board has the power to inject itself in the election. Under the construction of the National Labor Act as placed upon it by the Board, and upheld by the Courts, the employer is prohibited from discussing with any of his employees, their right or desire to join or not to join any Union; the Unions, however, are not so restricted, and are permitted to solicit members for its Union. Neither the Board, the Courts, nor the employer can or should have a right to

change the law as enacted. The Act does not say that representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees, unless the employer has been found guilty of coercion and intimidation against his employees; in other words, the law is to be construed only in accordance with the circumstances of each individual case. Assuming for the sake of argument, but not admitting, that Petitioner had committed the acts alleged against it, can the Board or the Courts write into the Act, and particularly in Section 9 (a), that which Congress did not intend. If this construction is upheld, the Board has not only judicial powers, but legislative powers, as well, as it can punish one company and not another, and the only reason that it need give would be that the company was guilty of coercion and intimidation. And in this connection, we would respectfully call this Court's attention to the fact, that any act, no matter how innocent, on behalf of the employer, could be construed as coercion or intimidation. It is not beyond the realm of imagination that a friendly "good morning" by an employer to its employee could be so construed. The construction placed upon this section by the Board and by the Court in the instant case, can become a double-edged sword. The Union, feeling that it could not muster a majority at an election, could induce some of its own members, who are employees of the company, to commit some act which could be construed as coercion, intimidation, surveillance or interference, and could secure the certification of the Union as exclusive bargaining agent when only a very small number of employees voted. Any act on the part of the employer or his agents could be construed as coercion, and the penalty would be in the hands of the Board alone. The Board's power and authority would be unlimited, and such a construction of the law

would not only cause great confusion, but the construction would be left entirely with the Board.

The *Virginia R.* v. *Federation*, 300 U. S. 515, was decided on the theory that a majority of the craft voted at the election, although less than a majority voted for the Federation. In the instant case only 56 out of 225 voted at the election.

In the *System Federation No. 40, etc.* v. *Virginia Railway Co.* (D. C.), 11 F. Supp. 621, it was held that under the Statute, as amended, a majority of the members of a craft, voting at an election called to choose a representative, was sufficient to that end, although such a majority was less in number than a majority of all who were qualified to vote, provided that all those who voted constituted a majority of those qualified to vote.

It is as reasonable to infer that if only one or two employees voted, and a charge of coercion and intimidation was made, all the employees of an appropriate unit, regardless of the number in that unit, would be forced to accept that Union as their bargaining agent. We contend that the law did not so intend.

2. Can the Board make retroactive its order by directing the company to pay back-pay to its employees who were laid off or discharged prior to the date when the Union was certified as the exclusive bargaining agent?

On June 1, 1938, the Board certified the Union as the exclusive representative of the employees in such unit. The complaint was filed against the Petitioner on June 24, 1938, based upon charges prior to that date, with the exception of those charges added during the hearing, on behalf of two employees, one of whom was discharged during the hearing. Until the Board had decided who the

bargaining agent should be for the employees of the Petitioner, and until the Petitioner was so notified on June 1, 1938, the Union's complaint filed against the company, would, of necessity, be limited to acts of the Petitioner subsequent to and not prior to June 1, 1938, and it is our contention that the Petitioner could not be found guilty of discrimination against employees for any acts committed prior to that date, and the Board's findings therefore that the Petitioner pay back-pay to certain employees from the date said employees were either laid off or discharged until reinstatement, should be figured from June 1, 1938, and not prior thereto, if the contention of the Board is to be sustained.

In 12 *Corpus Juris,* page 1100, Sections 805 and 806, it is stated:

> Every law which, assuming to regulate civil rights and remedies only, in effect, imposes a penalty or the deprivation of a right for something which, when done, was lawful.

Until the Board decided and the Company was notified that the International Ladies Garment Workers Union, Local 76, was declared the bargaining agent of the employees of the Petitioner, there could of necessity be no guilt on the part of Petitioner, as under the circumstances in this case, the Union having received less than a majority of the employees of the Unit, the Company could not have known that the Board would certify the Union as the bargaining agent. The Petitioner could not have known what was in the mind of the Board, and the International Ladies Garment Workers Union would have no right to file any complaints until the Board certified it as the bargaining agent on June 1, 1938.

Obviously the question of the power of the Board to declare a Union the bargaining agent where less than a majority of the employees of the unit appropriate for such purposes have voted for the Union, is a question of great importance in the administration of the Act, and inasmuch as it has not been passed upon by this Court, we respectfully submit that same should be settled by this Court.

CONCLUSION.

Wherefore, it is respectfully submitted that this Petition for Writ of *Certiorari* be granted.

Respectfully submitted,

JOHN L. MCINERNEY,
Attorney for Petitioner.

Of Counsel:
CHARLES L. COHNS.